88-1487

CASE NO. _____

Supreme Court, U.S.
FILED
JAN 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1988

IN THE MATTER OF:

ALVIN A. MULLER and PHYLLIS H. MULLER,

Debtors.

THE FIRST NATIONAL BANK OF PEORIA, a National Banking Association,

Plaintiff-Appellee, Respondent,

v.

ALVIN S. MULLER, PHYLLIS H. MULLER, GLEN ROGERS, ROBERT E. RICE, MYRTLE E. RICE, CHARLES E. COVEY, Trustee, and DANIEL M. HARROD,

Defendants-Appellants.

Petition for Writ of Certiorari of GLEN ROGERS,

Defendant-Appellant, Petitioner

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE

This case was tried without a jury before the bankruptcy court in Peoria, Illinois. The issue before the court was whether a lien asserted by the plaintiff, THE FIRST NATIONAL BANK OF PEORIA, upon a certified check was valid and enforceable. Appellant Rogers claimed an interest in the check as a "silent partner" of the payee who was the debtor. At the conclusion of the trial, the court ordered judgment in favor of the plaintiff Bank and against all defendants.

ROGERS appealed to the district court arguing, among other things, that the bankruptcy judge's conduct of the trial deprived him of due process. Appellant claims his rights were violated upon two occasions, at a pretrial hearing and at the trial five months later. Appellant made no objection before the trial court.

On appeal the district court

affirmed, ruling that appellant had waived any objection to the trial judge's conduct by not raising the issue prior to appeal. On further appeal, appellant argued no waiver had occurred because the trial judge's conduct was "plain error." The Seventh Circuit Court of Appeals affirmed the district court and the bankruptcy court, ruling that the record does not show error of the nature or extent that would warrant application of the plain error doctrine.

II. SUMMARY OF ARGUMENT

This is not an appropriate case for certiorari under the guidelines of Supreme Court Rule 17. The decision of the Seventh Circuit Court of Appeals in this case is not in conflict with any other court and does not depart from the accepted and usual course of judicial procedure.

III. ARGUMENT

Supreme Court Rule 17 provides, in summary, that certiorari will only be granted when there are important reasons, including a conflict of the opinion appealed from with another federal court of appeals or a state court of last resort or if the opinion departs substantially from the usual course of judicial proceedings. In this case the closest appellant has come to asserting one of these grounds is appellant's argument that if the Seventh Circuit had refused to rule upon the basis of the plain error doctrine, such refusal would have been inconsistent with rulings in other circuits where the plain error doctrine has been utilized in civil cases. But the Seventh Circuit here did not rule upon the question of whether plain error may be asserted in a civil case. Only a passing reference to that question was made in

dicta, and then the court examined the facts and ruled there was insufficient plain error to reverse the trial court. The court said:

> Rogers also makes a series of challenges to the bankruptcy proceeding, but as Rogers admits, he failed to raise these issues in that court. He thus has waived any challenge. Ohio Casualty Ins. Co. v. Bazzi Constr. Co., 815 F.2d 1146, 1149 (7th Cir. 1987). Rogers concedes his waiver and asks only that we review the challenged issues under a plain error analysis. It is dubious whether this circuit recognizes plain error in a civil proceeding, such as the case here. If invocable at all, "[o]nly in most exceptional circumstances we will allow a civil appellant to make a nonjurisdictional argument for the first time on appeal... ." Walker v. Maccabees Mut. Life Ins. Co., 753 F.2d 599, 602 (7th Cir. 1985). We are not persuaded that this case represents an exceptional circumstance. In re Muller, 851 F.2d 916, 918 (7th Cir. 1988).

After expressing doubts as to whether plain error may be asserted in a civil action, the court determined the facts of

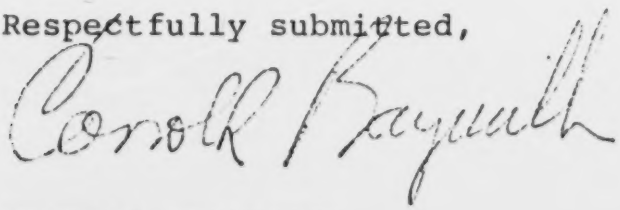
this case did not include such exceptional circumstances as to warrant invocation of the plain error doctrine.

In all other respects, the Seventh Circuit's opinion is also consistent with holdings of other courts and the accepted and usual course of judicial procedure.

IV. CONCLUSION

For the reasons stated, plaintiff-appellee, THE FIRST NATIONAL BANK OF PEORIA, requests denial of appellant's Petition for Writ of Certiorari.

Respectfully submitted,



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DAVID B. RADLEY hereby certifies that pursuant to Supreme Court Rule 28, he arranged and did send by United States Mail, with first-class postage prepaid and properly addressed to the Clerk of this Court, U. S. Supreme Court, Washington DC, forty copies of a Respondent's Brief in Opposition to Petition for Writ of Certiorari on the 26th day of January, 1989.

At the same time and place, postage prepaid by regular mailing, three copies of the foregoing Brief were mailed to the following attorneys:

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DAVID B. RADLEY

Subscribed and sworn to before me this 26th day of January, 1989.

Notary Public

"OFFICIAL SEAL"
NANCY K. FOOTE
Notary Public, State of Illinois
My Commission Expires 3-15-92